Co-Operative Central Bank Ltd (in receivership) & Ors v Rashid Cruz bin Abdullah & Ors and other appeals

COURT OF APPEAL (KUALA LUMPUR) — CIVIL APPEALS NO W–02–441 OF 1997, W–01–67 OF 1999, W–02–567 OF 1999 AND W–02–615 OF 1999
GOPAL SRI RAM, DENIS ONG JIEW FOOK AND HAIDAR J JCA
21 MARCH 2000

Civil Procedure — Judgments and orders — Setting aside — Order expressly exclude certain party from being added as parties and later ordering their joinder — Whether it is an interim order made pending disposal of the substantive motion — Whether offends the rule of functus officio

Industrial Relations — Dismissal of employees by receivers — Reference by Minister to Industrial Court — Who to join as parties

The Co-Operative Central Bank Ltd ('CCB') went into financial difficulties with excess of liabilities over assets amounted to almost RM650m. Bank Negara Malaysia ('BNM') exercised its powers under Essential (Protection of Depositors) Regulations 1986 and appointed two persons to assume control and carry on the business of CCB. After the receivers took over the conduct of CCB's businesses, they proceeded to terminate the services of all CCB's employees. Later, the receivers were replaced by appointees of BNM (the appointees). Subsequently, some of the assets and liabilities of CCB were sold and transferred to PhileoAllied Bank. The respondents, after the termination of their services, set in motion the procedure under s 20 of the Industrial Relations Act 1967 ('the Act'). Eventually, their dispute with CCB was referred to the Industrial Court. Numerous applications were made by various parties with regard to joining and removing of parties. When the substantive motion came on for hearing, CCB and the receivers took the point that there had been a suppression of material facts and argued that the leave should be revoked by the court. The learned judge refused that application. CCB and the receivers then appealed against that decision. This formed the subject matter of the first of the four appeals. Subsequently, the substantive motion was argued and the learned judge on 6 July 1999 made the orders quashing so much of the award of the Industrial Court relating to the striking out the receivers as parties; upheld the addition of PhileoAllied as a party to the Industrial Court proceedings; quashed so much of the award as refusing to join BNM and its appointees as parties to the proceedings before the Industrial Court. The thrust of the argument on the second point was that the learned judge had no powers to make the orders he did as he was by then functus officio. The third point raised was that no reasonable tribunal properly directing itself to the facts and the law would have come to the conclusion that the Industrial Court had erred in striking out the receivers as parties and refusing to join BNM and its appointees as parties to the dispute.

Held:

(1) The requirement that a party must make full disclosure of all relevant and material facts at the ex parte stage had not been one that had remained static. In scrutinizing the evidence at the ex parte stage, the court was satisfied that even if the additional evidence had been placed before the learned judge at the ex parte stage, he would have still granted leave (see paras 21 and 27).

(2) The order made on 30 June 1997 was in response to an application made by a summons in chambers. It was an interim order made pending disposal of the substantive motion. At the interim stage, the learned judge was adding parties and in the final stage, he was hearing merits of the substantive motion before him (see para 28).

(3) In the proceedings before the Industrial Court, it would be necessary for the adjudicating panel to determine as to who was the real employer at the material time. In *stricto sensu*, it was not CCB which terminated the contracts of employment but the receivers. But they were no longer in the picture. They had been replaced by the appointees of BNM. It is trite law that more than one person may be responsible for dismissing an employee without just cause or excuse. Therefore, viewing the evidence with utmost objectivity, the conclusion was that CCB, the receivers and the appointees of BNM were all necessary parties for the adjudication of the trade dispute before the Industrial Court. It may well be the receivers' argument that they were not and had never been the employers of the respondents. However, industrial adjudication was no respecter of labels (see para 31).

(4) The order of the learned judge in respect of PhileoAllied and his adverse comments about them were entirely unwarranted. The order that upholds the addition of PhileoAllied as a party to the proceedings before the Industrial Court were set aside. The adverse comments against PhileoAllied are to be expunged (see paras 35–36).

(5) As for BNM, the court was unable to see any reasonable factual or legal nexus between BNM and the dispute presently before the Industrial Court. Even taking the most extreme position on the facts, the court was unable to perceive a situation whereby BNM could be held responsible for the termination of the respondents. The appeal was allowed in so far as the judge directed the addition of BNM as a party to the proceedings before the Industrial Court (see para 39).

[**Bahasa Malaysia summary**

Co-Operative Central Bank Ltd ('CCB') telah mengalami masalah kewangan dengan liabiliti lebihan atas aset-aset berjumlah hampir RM650m. Bank Negara Malaysia ('BNM') telah melaksanakan kuasanya di bawah Peraturan-Peraturan Perlu (Perlindungan Pendeposit) 1986 dan melantik dua orang untuk mengawal dan mengendalikan perniagaan CCB. Selepas penerima-penerima telah mengambil alih pelaksanaan perniagaan

CCB, mereka seterusnya menamatkan perkhidmatan semua pekerja CCB. Kemudian, penerima-penerima tersebut telah digantikan dengan orang-orang yang dilantik oleh BNM ('orang-orang yang dilantik'). Berikutan itu, sebahagian aset-aset dan liabliti-liabilti CCB telah dijual dan dipindahkan kepada PhileoAllied Bank. Responden-responden, selepas penamaran perkhidmatan mereka, telah memulakan usul mengikut prosedur di bawah s 20 Akta Perhubungan Perusahaan 1967 ('Akta tersebut'). Akhirnya, pertikaian mereka dengan CCB telah dirujuk kepada Mahkamah Perusahaan. Beberapa permohonan telah dibuat oleh pelbagai pihak berkaitan pengambilan dan pelucutan pihak-pihak. Apabila usul substantif tersebut di hadapkan untuk perbicaraan, CCB dan penerima-penerima tersebut mengutarakan bahawa terdapat tindakan menyekat fakta-fakta material dan berhujah bahawa kebenarana sepatutnya dibatalkan oleh mahkamah. Hakim yang bijaksana telah menolak permohonan tersebut. CCB dan penerima-penerima tersebut kemudian telah merayu terhadap keputusan tersebut. Ini membentuk perkara pokok rayuan pertama kepada empat rayuan yang lain. Berikutan itu, usul substantif tersebut telah dihujah dan hakim yang bijaksana pada 6 Julai 1999 telah membuat perintah membatalkan award Mahkamah Perusahaan berkaitan pembatalan penerima-penerima tersebut sebagai pihak-pihak, mengekalkan penambahan PhileoAllied sebagai satu pihak kepada prosiding Mahkamah Perusahaan; membatalkan award tantang keengganan menggabungkan BNM dan orang-orang yang dilantik olehnya sebagai pihak-pihak kepada prosiding di hadapan Mahkamah Perusahaan. Inti pati hujah perkara kedua adalah bahawa hakim yang bijaksan tiada kuasa untuk membuat perintah-perintah yang beliau telah buat kerana telahpun pada masa itu functus officio. Perkara ketiga yang ditimbulkan adalah bahawa tiadak tribunal yang sewajarnya mengarahkan dengan betul tentang fakta-fakta dan dari segi undang-undang akan diputuskan bahawa Mahkamah Perusahaan telah tersilap dalam membatalkan penerima-penerima tersebut sebagai pihak-pihak dan enggan menggabungkan BNM dan orang-orang yang dilantik olehnya sebagai pihak-pihak kepada pertikaian tersebut.

Diputuskan:

(1) Keperluan di mana satu pihak harus membuat satu pendedahan penuh tentang semua fakta yang relevan dan material di peringkat ex parte bukan satu yang statik. Dalam meneliti keterangan di peringkat ex parte stage, mahkamah berpuas hati bahawa walaupun keterangan yang ditambah telah dikemukakan di hadapan hakim yang bijaksana di peringkat ex parte, beliau masih diberikan kebenaran (lihat perenggan-perenggan 21 and 27).

(2) Perintah yang dibuat pada 30 Jun 1997 adalah respons kepada satu permohonan yang dibuat melalui saman dalam kamar. Ia adalah satu perintah interim yang dibuat sementara menunggu penyelesaian usul substantif. Di peringkat interim, hakim yang bijaksana telah menambah pihak-pihak dan di peringkat akhir, beliau telah mendengar merit usul substantif tersebut di hadapan beliau (lihat perenggan 28).

(3) Dalam prosiding di hadapan Mahkamah Perusahaan, ia adalah perlu untuk panel yang mengadili tersebut menentukan siapa majikan sebenar pada masa matan. Dalam *stricto sensu*, ia bukan CCB yang menamatkan kontrak-kontrak pekerjaan tetapi penerima-penerima. Tetapi mereka tiada dalam gamabaran lagi. Mereka telah digantikan dengan orang-orang yang dilantik oleh BNM. Ia adalah undang-undang tetap bahawa lebih daripada seorang boleh bertanggungjawab untuk memecat seorang pekerja tanpa sebab atau alasan yang adil. Oleh itu, dengan meneliti keterangan secara objektif, kesimpulannya adalah CCB, penerima-penerima dan orang-irang yang dilantik oleh BNM kesemuanya adalah pihak-pihak yang perlu diadili dalam pertikaian dagangan di hadapan Mahkamah Perusahaan. Boleh jadi juga hujah penerima-penerima bahawa mereka bukan dan tidak pernah menjadi majikan responden-responden. Namun begitu, penghukuman perusahaan bukan pemberi label (lihat perenggan 31).

(4) Perintah hakim yang bijaksana berhubung PhileoAllied dan komen-komen yang memburukan mereka sewajarnya tidak diwarankan. Perintah yang mengekalkan tambahan PhileoAllied sebagai satu pihak kepada prosiding di hadapan Mahkamah Perusahaan diketepikan. Komen-komen yang memburukkan terhadap PhileoAllied hendaklah dihapuskan (lihat perenggan-perenggan 35–36).

(5) Bagi BNM, mahkamah tidak dapat melihat apa-apa nexus secara fakta atau dari segi undang-undang yang munasabah antara BNM dan pertikaian yang sekarang di hadapan Mahkamah Perusahaan. Walaupun dengan melihat kedudukan ekstrem berhubung fakta-fakta tersebu, mahkamah tidak dapat melihat keadaan di mana BNM boleh dianggap bertanggungjawab untuk pemecatan responden-responden. Rayun tersebut dibenarkan setakat mana hakim mengarahkan BNM ditambahkan sebagai satu pihak kepada prosiding di hadapan Mahkamah Perusahaan (lihat perenggan 39).]

Notes

For cases on setting aside of judgments and orders, see 2(2) *Mallal's Digest* (4th Ed, 2001 Reissue) paras 3555–3561.

Cases refered to

B Surinder Singh Kanda v Government of the Federation of Malaya [1962] 2 MLJ 169 (refd)
Badiaddin bin Mohd Mahidin & Anor v Arab-Malaysian Finance Bhd [1998] 1 MLJ 393 (refd)
Bharat Bank Limited Delhi v Employees of Bharat Bank Ltd Delhi AIR 1950 SC 304 (refd)
Brinks-Matt Ltd v Elcombe and Others [1988] 2 All ER 188 (refd)
Dormeuil Frères SA and another v Nicolian International (Textile) Ltd [1988] 3 All ER 199 (refd)
Dr A Dutt v Assunta Hospital [1981] 1 MLJ 304 (refd)
Esa bin Sa'yon v Woon Kim Poh [1985] 2 CLJ 283 (refd)

R v Kensington Income Tax Commissioners; ex p Princess Edmond De Polignac [1917] 1 KB 486 (refd)
Sari Artists Film Productions Sdn Bhd v Malaysia Film Industries Sdn Bhd [1974] 1 MLJ 123 (refd)

Legislation referred to

Essential (Protection of Depositors) Regulations 1986
Industrial Relations Act 1967 ss 20, 29(a), 52
Rules of the High Court 1980 O 53

Shahul Hameed Amirudin (P Jayasingam and T Kuhendran with him) (Zul Rafique & Partners) for the appellants in Civil Appeal No W–02–441 of 1997.
Dato' Sivaparamjothy (Ashokvijay S with him) (VK Lingam & Co, Lee Hishamuddin and Shook Lin & Bok) for the respondents in Civil Appeal No W–02–441 of 1997.
S Rajashree (Wong Pei Ling with her) (Cheang & Ariff) for the appellants in Civil Appeal No W–01–67 of 1999.
Dato' Sivaparamjothy (Ashokvijay S with him) (VK Lingam & Co, Lee Hishamuddin for the sixth respondent, Zulkifli Rafique & Partners for the seventh and eighth respondents in Civil Appeal No W–01–67 of 1999.
Shahul Hameed Amirudin (P Jayasingam and T Kuhendran with him) (Zul Rafique & Partners) for the appellants in Civil Appeal No W–02–567 of 1999.
Dato' Sivaparamjothy (Ashokvijay S with him) (VK Lingam & Co, Lee Hishamuddin and Cheang & Ariff) for the respondents in Civil Appeal No W–02–567 of 1999.
DP Naban (N Moharthas with him) (Lee Hishamuddin) for the appellant in Civil Appeal No W–02–615 of 1999.
Dato' Sivaparamjothy (Ashokvijay S with him) (VK Lingam & Co) for the respondents in Civil Appeal No W–02–615 of 1999.

Gopal Sri Ram JCA (delivering judgment of the court):

[1] This is the judgment of the court.

[2] The Co-Operative Central Bank Ltd ('CCB') is not a bank at all. It is a co-operative society registered and governed by the provisions of the Co-Operative Societies Act 1948. We are advised by counsel that it is still in existence. In 1987, CCB got into financial difficulties. According to the affidavit evidence placed before us at p 689 of the record of appeal in Appeal No W–02–567 of 1999, the excess of liabilities over assets amounted to almost RM650m. It was hopelessly insolvent. It had taken deposits from members of the public. There was a grave danger that innocent depositors would lose their monies. So the government acted.

[3] It got Bank Negara Malaysia ('BNM') to move under the Essential (Protection of Depositors) Regulations 1986. On 7 January 1988, BNM exercised powers under those regulations and appointed two persons to assume control and carry on the business of CCB. On 7 March 1989, BNM applied to the High Court in Kuala Lumpur and obtained the appointment

of Tuan Haji Zainal Abidin Putih and Tuan Haji Ahmad Kamal bin Abdullah Al-Yafii as the receivers of CCB ('the receivers').

[4] After the receivers took over the conduct of CCB's businesses, they proceeded to terminate the services of all CCB's employees. This includes the 116 respondents in these 4 appeals before us.

[5] Later, on 2 September 1993 on the application of BNM, the receivers were discharged and two persons were appointed to administer the affairs of CCB ('the appointees'). Subsequently, on 10 October 1994 some of the assets and liabilities of CCB were sold and transferred to PhileoAllied Bank.

[6] The respondents, after the termination of their services, set in motion the procedure under s 20 of the Industrial Relations Act 1967 ('the Act'). Eventually, their dispute with CCB was referred to the Industrial Court by the Honourable Minister. When the dispute reached the Industrial Court, the respondents applied to join the receivers as parties. The Industrial Court acceded to this request. The receivers then moved the High Court for an order of certiorari. Abu Mansor J (as he then was) acceded to that application. He quashed the decision of the Industrial Court. The respondents appealed to the Supreme Court. The main contention was that no leave was required to add parties to the proceedings. The Supreme Court set aside Abu Mansor J's decision. It restored the order of the Industrial Court and remitted the matter to that court.

[7] When the proceedings re-commenced in the Industrial Court, an application was made to have the receivers removed as parties. This is because the order discharging the receivers had already been made. The learned chairman after hearing arguments reserved his decision. Some one year and four months later, he delivered his interim award and held that the receivers were no longer necessary parties and ordered them to be struck out by exercising the powers conferred on him under s 29(a) of the Act. The respondents were unhappy with that interim award. They took it before the learned judge of the High Court on an application for certiorari. They applied for leave and got it.

[8] Later, on 21 March 1997, the respondents took out a summons in chambers to amend the substantive motion and to adduce further evidence by way of affidavit. When the substantive motion came on for hearing, CCB and the receivers took the point that there had been a suppression of material facts and argued that the leave should be revoked by the court. The learned judge refused that application. CCB and the receivers then appealed against that decision. It forms the subject matter of the first of the four appeals before us.

[9] In the course of hearing the respondents' substantive motion, the learned judge, on 30 June 1997, made an order on the respondents' summons dated 25 March 1997. By that order, the learned judge directed the addition of PhileoAllied and BNM as parties to the motion. The order, however, expressly excluded the appointees of BNM who had taken over from the receivers.

[10] Subsequently, the substantive motion was argued and the learned judge on 6 July 1999 made the following orders:

(i) he quashed so much of the award of the Industrial Court relating to the striking out the receivers as parties;

(ii) he upheld the addition of PhileoAllied as a party to the Industrial Court proceedings;

(iii) he quashed so much of the award as refusing to join BNM and its appointees as parties to the proceedings before the Industrial Court.

[11] He also made some consequential orders.

[12] On 9 July 1999, the learned judge clarified the order made on 6 July 1999. The clarification related to the addition of parties in the proceedings before the Industrial Court. At the time the learned judge made the orders in July 1999, there was pending an application before the Industrial Court by PhileoAllied, to have itself struck out from the proceedings as parties. That application had not been heard. We are advised by counsel that the application was to have been taken together with the hearing of the substantive dispute before the Industrial Court.

[13] When the learned judge came to write his judgment, he held that the Industrial Court had been right in joining of PhileoAllied as a party to the proceedings before it. PhileoAllied was unhappy with the comments made by the learned judge and so much of the order as upheld its addition as a party. It appealed against that part of the judgment of the learned judge. That appeal now forms the subject matter of Appeal No W–02–615 of 1999.

[14] BNM was also dissatisfied with the order of the learned judge adding them as a party to the Industrial Court proceedings. It too lodged an appeal which forms the subject matter of Appeal No W–01–67 of 1999.

[15] CCB, the receivers and the appointees of BNM were equally dissatisfied with the decision of the learned judge delivered on 6 July 1999. They appealed against those orders as clarified on 9 July 1999. Their appeal is the subject matter of Appeal No W–02–567 of 1999.

[16] Although there are four appeals before us, they raise common questions of facts and law. We have, therefore, with the consent of all counsel, heard four appeals together. For convenience, we will take the appeals by CCB, the receivers and the appointees first.

[17] Mr Shahul Hameed Amirudin and Mr P Jayasingam have argued that there are serious defects in the orders made by the learned judge and his reasons for making those orders. It has been submitted that the learned judge was wrong because:

(i) he failed to address his mind to that fact that material facts had been suppressed by the respondents at the ex parte stage;

(ii) having on 30 June 1997, expressly excluded the BNM appointees from being added as parties, he purportedly reversed himself and ordered

their joinder on 9 July 1997. Thus, it is said that it offends the rule of functus officio governing final orders of the High Court. In other words, what it is contended is that having made his order on 30 July 1999 he was functus officio and it was beyond his powers to make the orders he made on 6 July 1999;

(iii) he failed to appreciate, sufficiently or at all, that CCB was the real employer, that it was in existence, and the other parties, namely, the receivers and the appointees of BNM were unnecessary and ought not to have been added as parties.

[18] We will take the first argument on non-disclosure. Although this point was raised, neither Mr Jayasingam nor Mr Shahul Hameed Amirudin have been able to demonstrate to a conviction that the material placed at the ex parte stage before the learned judge was at variance substantially, with that which was placed before him on the substantive motion. Mr Shahul Hameed Amirudin has drawn our attention to a number of cases on injunctions including the leading case of *Sari Artists Film Productions Sdn Bhd v Malaysia Film Industries Sdn Bhd* [1974] 1 MLJ 123. We agree that the principles governing ex parte applications for injunctions are the same as those governing leave applications under O 53 of the Rules of the High Court 1980.

[19] The locus classicus upon the subject is *R v Kensington Income Tax Commissioners; ex p Princess Edmond De Polignac* [1917] 1 KB 486. There, in the Court of Appeal, Lord Cozens-Hardy MR stated the principles as follows (at p 504):

> It is a case in which it seems to me there was plainly a suppression of what was material, and we cannot be too strict in regard to that which to the best of my belief has been a long established rule of the Court in applications of this nature and has been recognized as the rule. The authorities in the books are so strong and so numerous that I propose to mention one which has been referred to here, a case of high authority, *Dalglish v Jarvie* (1850) 42 ER 89, which was decided by Lord Langdale and Rolfe B. The headnote, which I think states the rule quite accurately, is this: 'It is the duty of a party asking for an injunction to bring under the notice of the Court all facts material to the determination of his right to that injunction; and it is no excuse for him to say that he was not aware of the importance of any facts which he has omitted to bring forward.' Then there is an observation in the course of the argument by Lord Langdale: 'It is quite clear that every fact must be stated, or, even if there is evidence enough to sustain the injunction, it will be dissolved.' That is to say he would not decide upon the merits, but said that if an applicant does not act with *uberrima fides* and put every material fact before the Court it will not grant him an injunction, even though there might be facts upon which the injunction might be granted, but that he must come again on a fresh application.

[20] *R v Kensington Income Tax Commissioners* was a case of a writ of prohibition. It is of interest to note that *Daglish v Jarvie* was referred to as a case concerning an injunction.

[21] The requirement that a party must make full disclosure of all relevant and material facts at the ex parte stage has not been one that has remained static. There have been developments since *Kensington Commissioners*.

[22] In *Brinks-Matt Ltd v Elcombe and Others* [1988] 2 All ER 188, the English Court of Appeal after considering the judgment of the Court in *R v Kensington Tax Commissioners* went on to state a principle which we consider to be of some importance. It has been neatly summarized in the headnote to that case as follows:

> Whether a fact not disclosed is of sufficient materiality to justify or require immediate discharge of the order without examination of the merits depends on the importance of that fact to the issue to be decided by the judge on the application. The fact that the non-disclosure was innocent, in the sense that it was not known to the applicant or that its relevance was not perceived, is an important, but not decisive, consideration in deciding whether to order an immediate discharge.

[23] In *Dormeuil Frères SA and another v Nicolian International (Textile) Ltd* [1988] 3 All ER 199, Sir Nicolas Browne-Wilkinson VC (now Lord Browne Wilkinson) expressed views not dissimilar to those in *Brinks-Matt* which he referred to in his judgment.

[24] Finally, closer to home, in *Esa bin Sa'yon v Woon Kim Poh* [1985] 2 CLJ 283, Mahadev Shankar J (as he then was) had this to say in connection with the application for the discharge of an injunction on the ground of material non-disclosure:

> The grant of an injunction is the subject of a discretion which must of course be judicially exercised in all the circumstances of the case. Suppression and/or concealment are pejorative words, which import a culpable intent, to mislead the Court. It would be futile to attempt to provide a comprehensive definition here of what such an intent would cover. At one end of the spectrum, must be a situation where an objective appraisal of facts not disclosed, would have resulted in the injunction not being granted at all. Towards the other end of the spectrum must be the situation where, there is a subjective apprehension on the part of the applicant, that if the entire history of the dispute is laid out on the Bar Table, the injunction might not be so readily available. The dilemma between brevity and prolixity is always a perennial problem in advocacy.

[25] For our part, we would with gratitude, accept what his lordship said in that case and adopt it as a part of this judgment.

[26] Returning to the arguments of counsel, all that Mr Shahul Hameed Amirudin had to say was that there was certain evidence in the proceedings in the Industrial Court which was omitted initially and which was brought to the attention of the High Court later by way of additional evidence at the hearing of the substantive motion.

[27] We have carefully scrutinised the evidence at the ex parte stage and are left entirely satisfied that even if the additional evidence had been placed before the learned judge at the ex parte stage, he would have still granted leave. In fairness to the respondents, we are unable to detect any culpability by them. We are therefore satisfied that there is no merit in this argument.

[28] The thrust of the argument on the second point was that the learned judge had no powers to make the orders he did on 6 July 1999 and 9 July 1999 as he was by then functus officio. As was observed by the Federal

Court recently in *Badiaddin bin Mohd Mahidin & Anor v Arab-Malaysian Finance Bhd* [1998] 1 MLJ 393, the doctrine of functus officio forms part and parcel of the wider principle of estoppel. Upon close scrutiny of the counsel's argument, it is to be observed that the order made on 30 June 1997 was in response to an application made by a summons in chambers. It was an interim order made pending disposal of the substantive motion. At the interim stage, the learned judge was adding parties and in the final stage, he was hearing merits of the substantive motion before him. The doctrine of functus officio therefore has as much relevance to this case as cheese has to chalk. There is therefore no merit in this argument.

[29] Now we come to the third point raised. Here it is submitted that no reasonable tribunal properly directing itself to the facts and the law would have come to the conclusion that the Industrial Court had erred in striking out the receivers as parties and refusing to join BNM and its appointees as parties to the dispute. We would put aside our view on the addition of BNM for the moment and confine ourselves to the receivers and the BNM appointees.

[30] It is clear from the facts that the respondents' services were terminated by the receivers. It is equally clear from the order discharging the receivers that the appointees of BNM, and we quote from the terms of the order, 'be responsible for all liabilities … properly incurred' by the second and third appellants as receivers and managers of CCB. It is therefore clear that the appointees only held themselves responsible to the court for such acts as were within the proper exercise of the function of the receivers.

[31] In the proceedings before the Industrial Court, it would be necessary for the adjudicating panel to determine as to who was the real employer at the material time. Here we have a case which is not entirely straight forward. In *stricto sensu*, it was not CCB which terminated the contracts of employment. It was the receivers. But they are no longer in the picture. They have been replaced by the appointees of BNM. One cannot help gaining the impression that the receivers on the one hand and the appointees on the other hand are equally keen to wash their hands off the trade dispute now looming in the Industrial Court. It is reasonably plain from the fact pattern that one of the questions that the Industrial Court will have to determine: 'who is the person responsible for the termination of employment?' It is trite law that more than one person may be responsible for dismissing an employee without just cause or excuse. Therefore, viewing the evidence with utmost objectivity, we cannot escape the conclusion that CCB, the receivers and the appointees of BNM are all necessary parties for the adjudication of the trade dispute before the Industrial Court. It may well be the receivers' argument that they are not and have never been the employers of the respondents. However, industrial adjudication is no respecter of labels. In *Dr A Dutt v Assunta Hospital* [1981] 1 MLJ 304 at p 312, Chang Min Tat FJ cited the judgment of Mukherjee J in *Bharat Bank Limited Delhi v Employees of Bharat Bank Ltd Delhi* AIR 1950 SC 304 where it was said:

> In settling disputes between employers and workmen the function of the Tribunal is not confined to administration of justice in accordance with law. It can confer rights and privileges on either party which it considers reasonable and proper, though they may not be within the terms of any existing agreement. It has not merely to interpret or to give effect to the contractual rights and obligations of the parties. It can create new rights and obligations between them which it considers essential for keeping industrial peace.

[32] For these reasons, we strongly dissent from the argument advanced by Mr Shahul Hameed Amirudin and Mr Jayasingam. In our judgment, the learned judge was entirely correct in holding that the joinder of BNM, the receivers and the BNM appointees are a *sine qua non* for the resolution of this dispute. For reasons given so far both the appeals No W–02–441 of 97 and W–02–507 of 1999 are dismissed. The appellants must pay the costs of these appeals to the respondents.

[33] That brings us to the appeal of PhileoAllied Bank. We were urged by Dato' V Sivaparanjothi that there was nothing wrong in either the order made by the learned judge confirming the correctness of the addition of PhileoAllied or the adverse comments made by him.

[34] With respect, we are unable to agree. It cannot be gainsaid that the rules of natural justice should not be violated. A party cannot be condemned without being heard. As Lord Denning said in *B Surinder Singh Kanda v Government of the Federation of Malaya* [1962] 2 MLJ 169 at p 172:

> In the opinion of Their Lordships, however, the proper approach is somewhat different. The rule against bias is one thing. The right to be heard is another. Those two rules are the essential characteristics of what is often called natural justice. They are the twin pillars supporting it. The Romans put them in the two maxims: *Nemo judex in causa sua*: and *Audi alteram partems*. They have recently been put in two words Impartilaity and Fairness. But they are separate concepts and are governed by separate considerations.

[35] With respect, the order of the learned judge in respect of PhileoAllied and his adverse comments about them were entirely unwarranted. Accordingly, we would allow PhileoAllied's appeal.

[36] So much of orders dated 7 July 1999 and 9 July 1999 as upholds the addition of PhileoAllied as a party to the proceedings before the Industrial Court are set aside. The adverse comments against PhileoAllied are to be expunged. No reference is to be made to those passages in future proceedings connected with these litigations. But it must be remembered that the respondents are not the authors of this scenario. In our judgment, they bear no responsibility. In fairness to them, they were arguing quite a different point. We are therefore satisfied that there should be no order as to costs against the respondents. Consequently, Appeal No W–02 of 615 of 1999 is allowed. The deposit is to be refunded to PhileoAllied.

[37] We now turn to BNM.

[38] Once again, Dato' Siva has argued that BNM is a necessary and proper party. Ms Rajashree has argued that BNM is not. She subsequently

argued that the Industrial Court had no jurisdiction to make an adjudication against BNM because of s 52 of the Act. In our judgment, this section has nothing to do with the case. This case is not about the dismissal by BNM of one of its employees.

[39] Nevertheless, having scrutinized the order dated 2 September 1993 pursuant to which the receivers were discharged and the appointees were appointed, we are unable to see any reasonable factual or legal nexus between BNM and the dispute presently before the Industrial Court. Even taking the most extreme position on the facts, we are unable to perceive a situation whereby BNM can be held responsible for the termination of the respondents. We have therefore come to the conclusion that Appeal No W–01–67 of 1999 has merit. We allow it in so far as the judge directed the addition of BNM as a party to the proceedings before the Industrial Court. The order is hereby set aside.

[40] One final word. It has been some 11 years since the letters terminating the 116 employees were issued. Yet, the case for dismissal has not yet been heard by the Industrial Court. All litigation including industrial litigation involves some delay. That is inevitable. But it is a tragic circumstance upon the justice system that 116 people had to wait for 11 years before they are made aware whether their case can take off before the Industrial Court. We are vexed as to how such a problem can be overcome. We offer no solution. All we suggest is the speedy disposal of the cases and the refusal of the Industrial Court to entertain any further preliminary objections.

[41] In summary, our decisions are as follows:

(i) Appeals No W–02–441 of 1997 and W–02–567 of 1999 are dismissed with costs. The deposit will go to the respondents to account of their taxed costs;

(ii) Appeals No W–02–615 of 1999 and W–01–67 of 1999 are allowed to the extent as on the terms earlier indicated;

[42] Before concluding, we would like to thank all counsel for their careful and concise arguments. But for their assistance, these appeals would have been an insurmountable task.

Order accordingly.

Reported by Sally Kee Seok Meng